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No. 97-1287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HUGHES AIRCRAFT COMPANY AND
HUGHES NON-BARGAINING RETIREMENT PLAN,

Petitioners,

v.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, AND RICHARD E. HOOK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

INTRODUCTION

Respondents' argument boils down to the proposition that they own the investment income generated by their contributions to the Hughes plan, and that they are thus entitled to dismantle the plan so that they (and their lawyers) can divide up the alleged surplus. That proposition, embraced by the Ninth Circuit, is wrong. Nothing in ERISA creates any such entitlements. Unless and until Hughes decides to terminate the plan, respondents are entitled to no more and no less than their defined benefits.

What respondents are seeking in this case is a radical transformation of ERISA from a *shield* to protect promised plan benefits into a *sword* to extract surplus plan assets. That

objective is utterly antithetical to the statute's text, structure, and purpose. ERISA protects the long-term stability and security of employee benefit plans by ensuring that sufficient plan assets will be available to pay plan liabilities. If those assets fall below the level needed to fund defined benefits, the employer must make up the difference. If assets grow to exceed that amount, the surplus remains in the plan for future benefit payments. Plan assets, in other words, belong to the plan, not to the employer or to the individual employees who participate in the plan at any given moment in time.

By claiming a personal entitlement to the alleged surplus assets in the Hughes plan, respondents seek to overturn these settled principles. Their claims pose a direct threat to the Hughes plan and to all ERISA-covered plans. It is thus no surprise that those claims are opposed not only by the very employees respondents purport to represent (the longstanding associations of active and retired Hughes employees), but also by all three federal agencies entrusted with administering the statute (the Department of Labor, the Pension Benefit Guaranty Corporation, and the Internal Revenue Service). Because none of respondents' claims is cognizable under ERISA, the judgment should be reversed and the case remanded with instructions to dismiss the complaint.

I. RESPONDENTS HAVE NOT STATED A COGNIZABLE CLAIM UNDER ERISA'S FIDUCIARY PROVISIONS.

Respondents' three claims challenging Hughes' 1989 and 1991 amendments as violations of ERISA's fiduciary provisions fail as a matter of law because, as this Court has explained, "the act of amending a pension plan does not trigger ERISA's fiduciary provisions." *Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996); *see also id.* at 890 ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries."). Respondents offer three feeble rejoinders: (1) they reiterate the Ninth Circuit's assertion that *Spink* does not apply to plans funded in part by employee contributions, *see*

Resp. Br. 35-37; (2) they contend that the 1991 amendment was a "sham transaction" outside the scope of *Spink*, *see id.* at 13, 16-17; and (3) they attempt to recast their claims as challenges to the "implementation" (rather than adoption) of the 1991 amendment, *see id.* at 13, 17, 32-33. All three arguments are unavailing.

First, ERISA's definition of "fiduciary" provides no basis for a distinction based on the source of plan funding. *See* 29 U.S.C. § 1002(21)(A). That definition specifically encompasses acts of plan "management" and "administration," but is conspicuously silent with respect to acts of plan structure or design. Thus, as the *Spink* Court held, an employer does not act as a fiduciary when amending a plan. *See* 517 U.S. at 890-91.

It makes no difference whether the plan is contributory or non-contributory; as respondents themselves acknowledge, the statute "has one definition of 'fiduciary' for all plans," Resp. Br. 35; *see also* U.S. Br. 26 (noting that the contributory/non-contributory distinction is "irrelevant" in determining whether fiduciary duties are triggered). An employee does not become a plan sponsor or "co-settlor" by virtue of contributing to a plan. *See* U.S. Br. at 28-29. ERISA's fiduciary provisions simply do not limit an employer's discretion to amend a plan. *See, e.g., Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994).

Second, there is no basis for respondents' argument that the 1991 amendment was a "sham transaction" outside the scope of *Spink*. Notwithstanding respondents' use of quotation marks around the word "amendment," *see* Resp. Br. 16, there is no question that the 1991 amendment was in fact an amendment. To amend a plan is simply to "alte[r] the terms of a plan." *Spink*, 517 U.S. at 890. By altering the terms of the plan in 1991 to add the non-contributory benefit structure, Hughes self-evidently amended the plan. Under *Spink*, such a change in plan design is simply not a fiduciary act. *See id.* at 890-91.

Respondents thus frame the issue precisely backwards by asserting that "[s]ham transactions are not sanitized by calling them 'amendments.'" Resp. Br. 13. The point, rather, is that amendments are not subject to fiduciary duties by calling them "sham transactions." The "sham transaction" theory addressed in *Spink* relates to the *content* of ERISA's fiduciary duties, not the antecedent question whether such duties are triggered in the first place. *See* 517 U.S. at 895 & n.8 (discussed *infra* pp. 9-10). Because the act of amending a plan does not *trigger* ERISA's fiduciary provisions, it cannot *violate* those provisions. That does not mean that "'amending' a plan [is] an unreviewable act," Resp. Br. 40, but only that amending a plan is not a fiduciary act. Needless to say, the fact that plan amendments are outside the scope of ERISA's fiduciary provisions does not mean that plan amendments are outside the scope of the statute altogether. Several other provisions, including those relating to anti-inurement, vesting, and minimum funding, restrict the substantive content of plan amendments. *See Spink*, 517 U.S. at 891.

Third, respondents cannot salvage their fiduciary claims by recasting them as challenges to Hughes' "implementation" (rather than adoption) of the 1991 amendment. As an initial matter, respondents waived any such "implementation" claim by failing to raise it below or in opposing the petition for certiorari in this Court. This case has always been about whether the act of *amending the plan* was unlawful. That was certainly the way the District Court interpreted respondents' claims. *See* Pet. App. 58a (rejecting respondents' fiduciary claims on the ground that amending a plan does not trigger fiduciary duties), 60a-61a (same). That was also the way the Ninth Circuit interpreted those claims in the decision now before this Court for review. *See* Pet. App. at 14a-16a (upholding respondents' fiduciary claims on the theory that amending a plan *does* trigger fiduciary duties where employees have contributed to the plan); *id.* at 23a-25a (same). Not surprisingly, that was the premise underlying the challenge to respondents' fiduciary claims in the petition for certiorari. *See* Pet. i, 10-16 (challenging the notion that ERISA's fiduciary duties are triggered by the act of amending a plan). Respondents accepted that premise in their opposition to the petition, and said nothing to suggest that their fiduciary claims challenged the act of "implementing," as opposed to adopting, the challenged amendments. *See* Pet. Opp. i, 7, 10-22 (defending the Ninth Circuit's holding that the act of amending a plan triggers ERISA's fiduciary duties where employees have contributed to the plan). Accordingly, it is neither necessary nor appropriate for this Court to address respondents' belated "implementation" claim. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 965 n.5 (1998); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *Schiro v. Farley*, 510 U.S. 222, 228-29 (1994); S. Ct. Rule 15.2.

In any event, that claim fails on the merits for the simple reason that the mere payment of benefits pursuant to a plan is not a fiduciary act. Alleging an act of plan administration (as opposed to plan design) is *necessary* but not *sufficient* to trigger ERISA's fiduciary duties. The statutory definition of "fiduciary" is expressly limited to the exercise of "discretionary" authority in the course of plan administration. 29 U.S.C. § 1002(21)(A); *see also Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 129 (7th Cir. 1992) (Posner, J.) ("ERISA makes the exercise of discretionary authority a *sine qua non* of fiduciary duty."). The mere payment of benefits by a plan administrator pursuant to the plan's terms is not discretionary. *See, e.g., Flacche v. Sun Life Assurance Co.*, 958 F.2d 730, 734 (6th Cir. 1992). Where, as here, such "purely ministerial" tasks are at issue, ERISA's fiduciary provisions are not implicated. 29 C.F.R. § 2509.75-8, D-2; *see also Confer v. Custom Eng. Co.*, 952 F.2d 34, 39 (3d Cir. 1991) ("Since discretionary authority, responsibility or control is a prerequisite to fiduciary status, it follows that persons who

perform purely ministerial tasks, . . . cannot be fiduciaries because they do not have discretionary roles.").[1]

Indeed, acceptance of respondents' "implementation" claim would render *Spink* a dead letter: fiduciary challenges to plan amendments could always be framed as challenges to the "implementation," rather than the adoption, of those amendments. ERISA does not restrict indirectly what it permits directly.[2]

II. RESPONDENTS HAVE NOT STATED A COGNIZABLE CLAIM UNDER ERISA'S ANTI-INUREMENT PROVISION.

Respondents' claim that Hughes' 1989 and 1991 amendments violated ERISA's anti-inurement provision, 29 U.S.C. § 1103(c)(1), fails as a matter of law because "[a]n employer does not unlawfully use plan assets for its own benefit when it merely provides for the payment of benefits to plan participants." U.S. Br. 11. The anti-inurement provision requires that plan assets "be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1). An amendment that uses plan assets to pay benefits to plan participants does not violate that provision as a matter of law, even if the employer thereby obtains some incidental benefit. *See, e.g., Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1506 (10th Cir. 1995); Pet. Br. 22-23; U.S. Br. 21. Respondents do not contest that fundamental (and dispositive) proposition. Instead, they (1) insist that the 1991 amendment unlawfully used plan assets to pay benefits to participants in a *different* plan, Resp. Br. 14-23; (2) reiterate their conclusory allegation of a "sham transaction," *id.* at 16-17; and (3) assert that Hughes violated an obligation to hold plan assets in trust, *id.* at 25-31. None of these three interrelated arguments has merit.

First, respondents' repeated assertion that the 1991 amendment unlawfully used plan assets to pay a "separate" or "non-plan" corporate debt, *see, e.g.*, Resp. Br. 1, 12, 14, 15, 17, 19, 21, 33, 39, 50, rests entirely on the premise that the contributory and non-contributory benefit structures are two distinct plans. That premise is incorrect. As this Court has emphasized time and again, ERISA grants employers broad discretion over the creation and design of their plans. *See, e.g., Inter-Modal Rail Employees Ass'n v. Atchison, T. & S.F. Ry.*, 117 S. Ct. 1513, 1516 (1997); *Spink*, 517 U.S. at 890; *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). In exercising that discretion, employers are free to include multiple benefit structures in a single plan as long as "all the assets under the plan remain available to pay benefits to all of the participants and beneficiaries under the plan." U.S. Br. 19

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[1] In a similar vein, one of respondents' *amici* claims that Hughes violated ERISA's fiduciary provisions by amending the conditions for participation in the plan and then paying benefits pursuant to the amended definition. *See* Brief *Amicus Curiae* of the National Employment Lawyers Association 9-11. This claim was never alleged by respondents or addressed by the courts below, and thus is not properly before this Court. *See, e.g., Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995). In any event, the claim is meritless. There is no basis for distinguishing amendments to the conditions for participation in a plan from other amendments. As noted in text, the mere payment of benefits pursuant to the terms of an amended plan is not a fiduciary act.

[2] Respondents also allude in passing to yet another claim that has never before surfaced in this case—a claim that Hughes as plan administrator "lied" to plan participants about the non-contributory benefit structure and thereby violated its fiduciary duties. Resp. Br. 33. This new claim, which represents an unsubtle attempt to mimic *Varity Corp. v. Howe*, 516 U.S. 489 (1996), also has been waived. In any event, respondents have not even alleged that any ostensible misstatement was material or induced reliance. "There is . . . a world of difference between the employer's deliberate misleading of employees in *Varity Corp.* and [an alleged] failure to begin every communication to plan participants with a caveat." *Sprague v. General Motors Corp.*, 133 F.3d 388, 405 (6th Cir.), *cert. denied*, 118 S. Ct. 2312 (1998); *see also Frahm v. Equitable Life Assurance Soc.*, 137 F.3d 955, 960 (7th Cir. 1998) ("[C]laims that one or another bit of advice was misleading do not violate this statute."), *petition for cert. filed*, 66 U.S.L.W. 3783 (U.S. May 27, 1998) (No. 97-1915).

(citing, *inter alia*, 26 C.F.R. § 1.414(*l*)-1(b)(1); 29 C.F.R. § 2520.102-4); *see also* Pet. Br. 27-28.

Respondents' emphasis on the differences between the contributory and non-contributory benefit structures in the Hughes plan, *see* Resp. Br. 4-7, is therefore misplaced. Respondents do not dispute that both benefit structures draw upon a single pool of assets. That point alone disposes of their allegation of separate plans. As the United States—on behalf of all three federal agencies entrusted with administering ERISA—explains, the differences between the two benefit structures in the Hughes plan are irrelevant as a matter of law.[3] As long as "all of the assets of the amended plan are available to pay benefits to participants under both benefit structures," the Hughes plan is "a single plan under ERISA." U.S. Br. 19, 18.[4]

Respondents' argument to the contrary rests entirely on a line of cases addressing the question whether a particular promise of benefits is sufficiently definite to qualify as an ERISA-covered plan in the first instance. *See, e.g.*, Resp. Br.

[3] That conclusion is not altered by the fact (which respondents repeat *ad nauseam*) that Hughes' Director of Human Resources in 1990 sent employees a letter referring to the non-contributory benefit structure as "a new retirement plan." J.A. 198 (quoted at Resp. Br. 3-4, 5, 8, 14, 17, 19, 20, 21, 23). That letter was drafted in colloquial terms for workers, not in legalese for lawyers. *Cf. Librizzi v. Children's Mem. Med. Ctr.*, 134 F.3d 1302, 1305 (7th Cir. 1998) ("[C]omplex plans are hard to explain in a few words."). The letter is thus wholly irrelevant to the legal question whether the new contributory benefit structure is a new plan within the meaning of ERISA. *Cf. Adamo Wrecking Co. v. United States*, 434 U.S. 275, 278-80 (1978) (emphasizing that a term may have different meanings in different contexts).

[4] Respondents cite a Department of Labor opinion letter for the proposition that "'whether there is a single plan or multiple plans is an inherently factual question.'" Resp. Br. 21 (quoting Opinion No. 96-16A, 1996 WL 491410 (Aug. 27, 1996)). That letter, however, addressed an unfunded welfare plan for which "all benefits are paid out of the general assets of the Company," 1996 WL 491410, at *2, not a pension plan with a separate pool of assets. By definition, the "single pool of assets" test was inapplicable there.

19-20 (citing, *inter alia*, *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982)). Those cases stand only for the proposition that "a 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing and procedures for receiving benefits." *Donovan*, 688 F.2d at 1373 (quoting the statutory definition of "employee welfare benefit plan," 29 U.S.C. § 1002(1)). That proposition is wholly irrelevant here, as there is no dispute that the Hughes plan is an ERISA-covered plan. The question whether an ERISA-covered plan exists at all is obviously different from the question whether the creation of a new benefit structure within such a plan can be characterized as the creation of a new plan. Indeed, those two questions are governed by entirely different regulations. *Compare* 29 C.F.R. § 2510.3 (listing factors relevant to the inquiry whether an ERISA-covered "plan" has been created) *with* 29 C.F.R. § 2520.102-4 (stating that "an employee benefit plan may provide different benefits for various classes of participants and beneficiaries").[5]

Second, the 1991 amendment cannot remotely be characterized as a "sham transaction," Resp. Br. 16-17, to give rise to a legally cognizable anti-inurement claim. This Court observed in *Spink* that an employer's discretion over "the payment of benefits pursuant to an amended plan" might be constrained "[i]f the benefits payment were merely a sham transaction, meant to disguise an otherwise unlawful transfer of assets to a party in interest, or involved a kickback scheme."

[5] Even if the non-contributory benefit structure were indeed a separate plan, nothing in ERISA would authorize respondents to challenge a transfer of all or part of the surplus from the original plan to the new plan. *See* Pet. Br. 26 n.3, 29 n.6. Respondents' observation that I.R.C. § 414(*l*) limits an employer's discretion in this regard, *see* Resp. Br. 23, misses the point because that provision is part of the Internal Revenue Code, not ERISA. It goes without saying that private parties, like respondents, have no private right of action to enforce the tax code. *See, e.g.*, *Trenton v. Scott Paper Co.*, 832 F.2d 806, 810 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988).

517 U.S. at 894-95 & n.8. That observation is irrelevant here, as the 1991 amendment of the Hughes plan did not "disguise" anything. It did precisely what it purported to do: it established a new non-contributory pension benefit structure for future employees and those current employees who elected to participate in the new structure. There is nothing shady or underhanded about the creation of such a benefit structure; it is a perfectly legitimate (and common) means of providing retirement benefits.

Thus, as the United States explains, the 1991 amendment cannot be characterized as a "sham transaction" because it "provides real benefits to real participants." U.S. Br. 24-25 n.14; *see also* Pet. App. 45a n.12 (Norris, J., dissenting) (noting that respondents "merely allege 'sham' in a conclusory fashion"). Respondents' open-ended approach to the "sham transaction" concept (endorsed by the panel majority below, *see* Pet. App. 24a) would render *Spink* a dead letter by transforming a narrow exception into the general rule.

Third, respondents' lengthy discussion of the relationship between ERISA's anti-inurement provision and traditional trust principles, *see* Resp. Br. 25-31, is wholly beside the point. The trust principles invoked by respondents add nothing to what the anti-inurement provision states on its face—that the assets of a defined benefit plan must be used for the exclusive benefit of plan participants. That is precisely what happened here: Hughes used plan assets to pay benefits to plan participants. Whether Hughes thereby received any incidental benefits "is of no moment." *Fletcher v. Kroger Co.*, 942 F.2d 1137, 1140 (7th Cir. 1991); Pet. Br. 22-23. "[A]mong the 'incidental' *and thus legitimate* benefits that a plan sponsor may receive from the operation of a pension plan are attracting and retaining employees, paying deferred compensation, . . . providing increased compensation without increasing wages, [and] increasing employee turnover." *Spink*, 517 U.S. at 893 (emphasis added); *see also* U.S. Br. 23 ("[T]here is no reason why an employer may not . . . benefit by amending the plan to

provide for the use of surplus assets to create a new benefit structure for current and new employees.").

Respondents' contrary argument is based entirely on the suggestion that Hughes engaged in "indiscriminate" use of plan assets for its own benefit. Resp. Br. 39; *see also id.* at 7 (asserting that this case is "just as if the [plan] had paid Hughes' wage, debt service or electric bills"). That suggestion is false—every penny at issue here went to pay benefits to plan participants. It is simply not true that Hughes "siphoned off" any plan assets to pay its own bills. Resp. Br. 47. Respondents are thus tilting at windmills. The relevant question is whether ERISA's anti-inurement provision limits an employer's discretion to amend a plan to provide new benefits for plan participants. The answer to that question (which respondents do not even dispute) is plainly no.[6]

III. RESPONDENTS HAVE NOT STATED A COGNIZABLE CLAIM UNDER ERISA's VESTING AND NONFORFEITURE PROVISION.

Respondents have all but abandoned their claim that the 1989 and 1991 amendments violated ERISA's vesting and

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[6] Respondents' passing suggestion (in a footnote) that "[t]he petition for certiorari did not appear to challenge [the Ninth Circuit's anti-inurement] holding," Resp. Br. 32 n.19, is baseless. The third question presented in the petition specifically challenged whether plan participants "have a legally-cognizable property interest not only in their defined benefits but also in the assets held by the plan." Pet. i. As the petition pointed out, all of respondents' claims ultimately rest on "the erroneous premise that respondents have a property interest not only in their defined benefits under the Plan, but also in the assets held by the Plan." *Id.* at 16. Because that premise is incorrect, petitioners "could not possibly have violated ERISA's fiduciary, *anti-inurement*, vesting, or other provisions." *Id.* at 18 (emphasis added); *see also id.* at 3 (noting that "*all* of respondents' claims" are based on this erroneous premise) (emphasis added). Because the petition clearly challenged "all of respondents' claims," all of those claims (which were passed on below and have been fully briefed by both the parties and *amici*) are properly before this Court. *See, e.g.*, *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379-80 (1995).

nonforfeiture provision, 29 U.S.C. § 1053. Rather than defending the Ninth Circuit's holding that "employees are vested in their own contributions *and the income generated therefrom*," Pet. App. 21a (emphasis added), respondents now concede that plan participants are vested only in their "contributions *plus an imputed rate of interest*," Resp. Br. 48-49 (emphasis added). Accordingly, it is now undisputed that respondents have no vested and nonforfeitable right to the actual investment returns attributable to their contributions to the Hughes plan. *See* Pet. Br. 30-32; U.S. Br. 20 ("[E]mployees in an ongoing defined benefit plan do not have vested rights in the 'income' generated by their own mandatory contributions"). Because respondents' claim under § 1053 is premised entirely on the existence of such a right, *see* J.A. 27-28, 242, that claim is legally baseless.[7]

Instead of surrendering their vesting claim outright, respondents attempt to recast it as a minimum-funding claim. *See* Resp. Br. 49 ("Petitioners admit that § 1053 might be breached 'by depleting plan assets that are needed' for nonforfeitable accrued benefits. That is precisely what plaintiffs allege.") (citing Pet. Br. 32). Respondents, however, have never alleged that the plan's use of surplus assets threatens its ability to pay vested benefits. To the contrary, their complaint specifically alleges that "the assets of the Plan are substantially *in excess* of those required to fund all current and future pensions." J.A. 26, 241 (emphasis added); *see also*

[7] Respondents nonetheless claim that they have vested rights in the income generated by their contributions to the plan *after* the 1991 amendment. *See* Resp. Br. 21-22, 49 n.27 (citing 29 U.S.C. § 1054(c)(4)). This is yet another claim that has never been asserted at any prior stage of this litigation, and has thus been waived. In any event, the claim is baseless. The provision cited by respondents applies only to *voluntary* contributions to "a defined benefit plan which permits voluntary employee contributions." 29 U.S.C. § 1054(c)(4), Pet. App. 84a. The Hughes plan, however, does not authorize voluntary contributions, and respondents' contributions are mandatory. *See* J.A. 108, 134 (stating that participants in the contributory structure "shall" contribute 3% of their salaries).

id. at 25, 240 (alleging that the plan "accumulated a substantial *overfunding*") (emphasis added). That excess more than satisfies ERISA's minimum funding provisions, which require only that plan assets equal accrued benefits. *See* 29 U.S.C. § 1082; Pet. Br. 32. Respondents' newly minted minimum-funding claim thus fares no better than their discredited vesting claim.

The failure of respondents' vesting claim dooms all of their claims. This entire case is ultimately premised on the notion that each participant in the Hughes plan is entitled to the income generated by his own contributions. Because no such entitlement exists, that notion is baseless. Indeed, that notion is inconsistent with the very concept of a defined benefit plan. Such a plan pools all assets, and uses that pool to pay benefits to all participants. As respondents themselves explain, the "[a]ssets of defined benefit plans are held for participants as a group." Resp. Br. 25. Unless and until a defined benefit plan is terminated, its assets must remain in the plan to satisfy current and future liabilities. Pooling assets and liabilities in this manner spreads risks over time, and thereby helps to ensure that all participants receive their defined benefits. As long as any given participant receives his defined benefits out of plan assets, he has no right to complain that others do as well.

IV. RESPONDENTS HAVE NOT STATED A COGNIZABLE CLAIM UNDER ERISA'S ASSET-DISTRIBUTION PROVISION.

Respondents' claim that Hughes violated ERISA's asset-distribution provision, 29 U.S.C. § 1344, fails as a matter of law because Hughes never terminated the plan and hence that provision was never triggered. Section 1344, by its terms, applies only "[i]n the case of the termination of a single-employer plan." 29 U.S.C. § 1344(a), Pet. App. 121a. Respondents now concede that the Hughes plan (from which they continue to receive benefits) has never been terminated; they argue instead that Hughes "should have" terminated the

plan in 1991, Resp. Br. 12, 15, and should be "order[ed]" to do so now, *id.* at iii, 13, 48. That argument makes no sense. Where, as here, there has been no termination, by definition there has been no violation of the provision governing the distribution of plan assets after termination. Respondents' concession on termination, in other words, forecloses their claim under § 1344.

Respondents' current position on termination represents a stark about-face. The complaint alleges that "the Plan was terminated on January 1, 1991," the effective date of the amendment adding the non-contributory benefit structure. J.A. 20. The fourth cause of action, which asserts a violation of § 1344, is premised on that allegation. *See id.* at 29. The District Court rejected the allegation and claim, holding that the "[c]reation of a new benefit structure does not terminate a plan," and that "plan terminations must be accomplished pursuant to the rules specified in 29 U.S.C. § 1341, and there is no allegation by plaintiffs that such a procedure has been instituted." *Id.* at 59a. The Ninth Circuit, in contrast, accepted the allegation and claim, asserting that a factual question existed about whether Hughes terminated the plan in 1991 and thereafter violated § 1344 by failing to distribute plan assets. *Id.* at 22a-23a; *see also id.* at 10a-11a & n.3. When respondents subsequently amended their complaint, they reiterated their allegation that "the Plan was terminated on January 1, 1991." J.A. 234-35; *see also id.* at 243 (alleging that Hughes violated § 1344 by failing to distribute plan assets after terminating the plan "effective January 1, 1991").

The most obvious flaw in respondents' original termination theory (embraced by the Ninth Circuit) is that ERISA's intricate framework governing plan termination has never even been invoked, much less satisfied, with respect to the Hughes plan. Notwithstanding the Ninth Circuit's assertion (deleted in response to the petition for rehearing) that "ERISA does not define when a termination occurs," Pet. App. 11a n.3, an entire title of the statute is devoted to precisely that subject. Indeed,

Title IV of ERISA sets forth the "*[e]xclusive* means of plan termination," 29 U.S.C. § 1341(a)(1) (emphasis added), and it is a cumbersome process, *see, e.g., In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 649 (2d Cir. 1983). ERISA provides for no such thing as a "constructive" termination—either there is an actual termination pursuant to the terms of the statute or there is not. The United States, representing the views of the PBGC and other agencies, agrees that the Hughes plan was not terminated in 1991 as a matter of law. *See* U.S. Br. 12-13 & n.2.

Confronted with this straightforward proposition, respondents have abandoned their original theory (and the holding below) and now concede that Title IV's "exclusive means of plan termination" never have been followed, and accordingly that the Hughes plan never has been terminated. *See* Resp. Br. 13, 40-42; *see also id.* at 9 (acknowledging that "Title IV sets forth the 'exclusive means,' 29 U.S.C. § 1341(a)(1), for pension plan termination"). Rather than arguing that the plan terminated in 1991, respondents now argue that the plan should be terminated at some point in the future as a result of this litigation. As they put it, "[t]he issue for this Court is not whether a plan can only be terminated through Title IV means, which no one denies, but whether a court can order an unwilling employer to use those procedures." *Id.* at 41.

That shift in position is fatal to respondents' § 1344 claim. That provision governs the distribution of plan assets *after* a termination, and thus cannot be violated unless and until a termination has occurred. Because the Hughes plan has never been terminated (as respondents now concede), there has been no violation of the asset-distribution requirements of § 1344, and respondents' fourth cause of action fails as a matter of law.

Rather than pursuing their § 1344 claim based on the notion that Hughes terminated the plan in 1991, respondents now argue that the Hughes plan should be terminated in the future because it is a "wasting trust" that Hughes has a duty to

terminate under ERISA. *See* Resp. Br. 41-43. This alleged "duty to terminate" comes out of thin air. It is not pleaded in the complaint, was not addressed by the courts below, and has no basis in the statute.

To the contrary, ERISA operates on the basic premise that employers have broad discretion over the adoption, modification, and termination of employee benefit plans. *See supra* p. 7; *see also* U.S. Br. at 17-18. Title IV provides two—and only two—means of plan termination: (1) voluntary termination by the employer, *see* 29 U.S.C. § 1341, Pet. App. 100a-114a; and (2) involuntary termination by the PBGC when a plan is underfunded or benefits are otherwise in jeopardy, *see* 29 U.S.C. § 1342, Pet. App. 114a-121a. *See, e.g., PBGC v. LTV Corp.*, 496 U.S. 633, 638-39 (1990). There is nothing in the statute requiring an employer to terminate an adequately funded plan.

Respondents insist that the narrow scope of involuntary termination under ERISA creates a statutory gap that can be filled by recourse to the common law. *See* Resp. Br. 41, 44-48. There is no such gap. Title IV is comprehensive and, by its terms, "exclusive." 29 U.S.C. § 1341(a)(1). An entire federal agency, the PBGC, exists to administer its provisions. The statute carefully circumscribes the PBGC's authority to order an involuntary termination to situations involving underfunded plans. Needless to say, it would make no sense to construe the statute to leave the field wide open for courts to order involuntary termination of underfunded plans (much less adequately funded plans) outside this statutory framework. As the United States explains, "allowing a common law doctrine to 'deem' a plan terminated . . . would undermine the certainty created by the Act and would jeopardize the orderly administration of plan terminations." U.S. Br. 14. ERISA, in short, leaves no room for courts to resort to the common law to force employers to terminate fully funded plans against their will. *See, e.g., Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251,

259 (1993); *cf. Dooley v. Korean Air Lines Co.*, 118 S. Ct. 1890, 1895 (1998).[8]

In any event, respondents' characterization of the Hughes plan as a common-law "wasting trust" is fanciful. They insist that they can prove to an "actuarial certainty" that the plan's assets will invariably exceed its liabilities. Resp. Br. 8, 10, 14, 15, 44. Any such "certainty," however, is illusory—not only because the plan's assets and liabilities fluctuate constantly, but also because Hughes could amend the plan at any time (and thus could, for example, allow new enrollment in the contributory benefit structure).

Moreover, there is no principle of trust law providing that a trust must be terminated whenever it is clear that its assets will invariably exceed its liabilities. The termination of a trust at common law is governed by the settlor's intent. *See, e.g.,* George G. Bogert & George T. Bogert, *Trusts & Trustees* § 996, at 257-58 (rev. 2d ed. 1983). A "wasting trust" is nothing more than a trust the material purposes of which have been fulfilled, and the continuation of which would thus frustrate the settlor's intent. *See id.* § 1007, at 395-97; *see also* Resp. Br. 10 (noting that a "wasting trust" results "if a trust's assets will not be used for their intended purposes"); *id.* at 15 (same). Where, as here, it is clear that the material purposes of a trust have not yet been fulfilled, and the settlor actively opposes termination, there is no "wasting trust" under the common law. *See* Pet. Br. 41 n.9; U.S. Br. 16-18.

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[8] Respondents' reliance on cases enforcing an employer's *contractual* promise to terminate a plan is misplaced. *See* Resp. Br. 41-42. Nothing in ERISA prevents an employer from "contractually ced[ing] its freedom" over plan termination. *Inter-Modal Rail Employees Ass'n v. Atchison, T. & S.F. Ry.*, 117 S. Ct. 1513, 1516 (1997). Contrary to respondents' assertion that there is "little difference" between application of the common law of contracts and the common law of trusts in this context, Resp. Br. 41; *see also id.* at 14, there is vast and obvious difference: contract law simply enforces duties voluntarily undertaken by the employer, whereas trust law would impose new substantive duties. *See, e.g., American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232-33 (1995).

In the face of these authorities, respondents retreat from their emphasis on the common law and insist that ERISA sought to "modify traditional trust law's emphasis on settlor instructions when this did not adequately protect the interest of plan participants." Resp. Br. 48 (internal quotation omitted). The argument thus comes around full circle: respondents insist that a gap in ERISA must be filled by the common law, but then (when the common law fails to support them) insist that the common law must be overridden by ERISA. What respondents seek to apply, in the final analysis, is a common law of ERISA based on nebulous policies and purposes. In applying that common law, moreover, they would ignore the views of the federal agencies entrusted with administering the statute. The only governing principle, apparently, is that plaintiffs always win. This Court, however, has soundly rejected such a result-oriented approach. *See Mertens*, 508 U.S. at 261-63.

Underlying all of respondents' arguments is the suggestion that Hughes pulled a fast one by refusing to terminate its plan. That suggestion is baseless. It is true that plan participants have a post-termination interest in the assets of a plan to which they have contributed. *See* 29 U.S.C. § 1344. Prior to termination, however, an employer remains free to use plan assets to meet plan liabilities. Under no circumstances can respondents invoke their post-termination interest in the plan assets to force a termination in the first place. The argument that Hughes' refusal to terminate the plan has deprived respondents of money that is rightfully theirs is thus hopelessly circular, as respondents have no right to the plan's assets prior to termination. *See* Pet. Br. 43. Their only right is to their defined benefits, which they are concededly receiving.[9]

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[9] The circularity of respondents' claims is especially evident in their fall-back contention that, in lieu of termination, a court could order "an improvement in benefits so [the] surplus can be used." Resp. Br. 47. That "remedy" would expressly grant respondents what their "duty to terminate" claim implicitly seeks: the right to parlay their post-termination right to

(continued...)

CONCLUSION

The Hughes plan is everything a pension plan should be: a financially sound source of benefits for past, current, and future plan participants. The existence of a surplus in such a plan is to be welcomed, not condemned. ERISA neither requires nor permits the involuntary termination of an adequately funded plan. Respondents are receiving their defined benefits; everything is working as planned. Just as in the fable, however, respondents and their lawyers cannot resist the temptation to kill the goose to lay their hands on the golden egg. The threat they pose to the stability and security of all pension plans is obvious, and explains why their efforts are opposed not only by the associations of current and former Hughes employees, but also by all three federal agencies entrusted with administering ERISA.

This lawsuit has now dragged on for more than six years. That is already far too long to leave the pension benefits of Hughes employees in legal limbo. This Court should end this lawsuit for once and for all. Accordingly, the Ninth Circuit's judgment should be reversed, and the case remanded with instructions to dismiss the complaint.

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[9] (...continued)

surplus assets into a pre-termination right to more than their defined benefits. Respondents have no such right.

Respectfully submitted,

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